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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/756,544	01/12/2004	David H. Dicks	nova0104fimt	3848
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MANCHESTER, NH 03104				
EXAMINER				
LONG, DONNELL ALAN				
ART UNIT		PAPER NUMBER		
3754				
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

# Office Action Summary

**Application No.**

10/756,544

**Applicant(s)**

DICKS ET AL.

**Examiner**

DONNELL LONG

**Art Unit**

3754

**Period for Reply** -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 30 June 2011.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ An election was made by the applicant in response to a restriction requirement set forth during the interview on \_\_\_\_; the restriction requirement and election have been incorporated into this action.
- 4) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 5) ☒ Claim(s) 1-10 and 22-42 is/are pending in the application.
- 5a) Of the above claim(s) 34-36 is/are withdrawn from consideration.
- 6) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 7) ☒ Claim(s) 1-10, 22-33 and 37-42 is/are rejected.
- 8) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 9) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 10) ☒ The specification is objected to by the Examiner.
- 11) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 12) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-800)  
Paper No(s)/Mail Date \_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_

### **DETAILED ACTION**

1. Amendment filed June 30, 2011 has been acknowledged. Newly presented claims 39-42 have been entered. Claims 1-10 and 22-42 remain pending in the application.

#### ***Specification***

2. The specification is objected to as failing to provide proper antecedent basis for the claimed subject matter. See 37 CFR 1.75(d)(1) and MPEP § 608.01(o). Correction of the following is required: There does not appear to be support in the specification for a first and second material.

#### ***Claim Rejections - 35 USC § 112***

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

4. Claims 39-42 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The claims are considered vague and indefinite because it is unclear what is meant by substantially different melting points.

#### ***Claim Rejections - 35 USC § 102***

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

6. Claims 1-6, 9, 37-39, and 42 (as presently understood) are rejected under 35 U.S.C. 102(b) as being anticipated by Henfrey (GB1104359).

Regarding claim 1, Henfrey discloses a fitment and flexible container comprising:  
a lower fitment member (14) including an upper surface and an opening;  
a wall of the flexible container on the top surface of the lower fitment member  
(Fig. 9); and

an upper fitment member (21) including an upper and lower surface and conduit aligned with the opening in the lower fitment.

Regarding claim 2, the upper fitment member includes a septum (29) in axial alignment with the upper fitment conduit.

Regarding claim 3, the septum is made of a material and is resilient at least to a degree.

Regarding claim 4, a layer of resilient material (11) is disposed between the upper and lower fitment.

Regarding claim 5, the fitment includes a gasket (19) between the upper and lower fitment members.

Regarding claim 6, the upper fitment member includes an elongated tube (25).

Regarding claim 9, the upper and lower fitment members inherently have some degree of impermeability or low permeability to certain gases, such as air for example.

Regarding claim 37, Henfrey discloses a fitment and flexible container comprising:

a lower fitment member (14) including an upper surface and an opening;

a wall of the flexible container on the top surface of the lower fitment member (Fig. 9); and

an upper fitment member including an upper and lower surface and conduit aligned with the opening in the lower fitment.

Regarding claim 38, the upper fitment member includes a septum (29) positioned within the conduit.

Regarding claim 39, the fitment is made of a first convenient material (page 2, lines 69 and 70) and the flexible container is made of a second thermoplastic resinous material (page 2, lines 20 and 21).

Regarding claim 42, the fitment is made of a first convenient material (page 2, lines 69 and 70) and the flexible container is made of a second thermoplastic resinous material (page 2, lines 20 and 21).

***Claim Rejections - 35 USC § 103***

7. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

8. Claims 7, 8, and 22-27, and 40 (as presently understood) are rejected under 35 U.S.C. 103(a) as being unpatentable over Henfrey in view of Gross (6439429).

Regarding claim 7, Henfrey DIFFERS in that it does not disclose posts as claimed. Attention, however, is directed to the Gross reference, which discloses another

fitment with posts (134) for securing an upper fitment member to a lower fitment member.

It, therefore, would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the Henfrey reference in view of the teachings of the Gross reference by employing posts to more effectively secure the upper and lower fitment members together.

The modified Henfrey discloses the claimed invention except for the posts being on the lower fitment as claimed. It would have been obvious to one having ordinary skill in the art at the time the invention was made to arrange the posts on the bottom fitment instead of the top fitment, since it has been held that rearranging parts of an invention involves only routine skill in the art. *In re Japikse*, 86 USPQ 70.

Regarding claim 8, the method of forming the device (i.e. by fusing) is not germane to the issue of patentability of the device itself. Therefore, this limitation has not been given patentable weight.

Claims 22-27 are rejected as an obvious use of Henfrey as modified by Gross. The method of providing a flexible bag and fitment combination as claimed is considered a natural use of the Henfrey apparatus as modified by Gross, since the modified Henfrey contains all structural limitations as discussed above.

Regarding claim 40, the fitment is made of a first convenient material (page 2, lines 69 and 70) and the flexible container is made of a second thermoplastic resinous material (page 2, lines 20 and 21).

9. Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Henfrey in view of Sparacio et al. (4775523).

Henfrey DIFFERS in that it does not disclose that the fitment is made of a material as claim. Attention, however, is directed to the Sparacio reference, which discloses a flexible bag made partially of acrylonitrile methyl acrylate copolymer for preserving the contents of the flexible bag.

It, therefore, would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the Henfrey reference in view of the teachings of the Sparacio reference by employing acrylonitrile methyl acrylate copolymer in order to preserve the contents of the bag. Further, it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice.

10. Claims 28-33 and 41 (as presently understood) are rejected under 35 U.S.C. 103(a) as being unpatentable over Henfrey (GB1104359) in view of Sparacio et al. (4775523) and Gross (6439429).

Henfrey discloses a fitment and flexible container comprising:

a lower fitment member (14) including an upper surface and an opening;

a wall of the flexible container on the top surface of the lower fitment member

(Fig. 9);

an upper fitment member including an upper and lower surface and conduit aligned with the opening in the lower fitment;

a layer of resilient material (11) disposed between the upper and lower fitment;

a gasket (19) between the upper and lower fitment members; and  
a septum (29) in axial alignment with the upper fitment conduit.

Henfrey DIFFERS in that it does not disclose that the flexible bag is multi-layered as claim. Attention, however, is directed to the Sparacio reference, which discloses a flexible bag made of multiple layers for purposes of preserving the contents of the bag.

It, therefore, would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the Henfrey reference in view of the teachings of the Sparacio reference by employing multiple layers in order to preserve the contents of the package.

The modified Henfrey DIFFERS in that it does not disclose posts as claimed. Attention, however, is directed to the Gross reference, which discloses another fitment with posts (134) for securing an upper fitment member to a lower fitment member.

It, therefore, would have been obvious to one having ordinary skill in the art at the time the invention was made to further modify the modified Henfrey reference in view of the teachings of the Gross reference by employing posts to more effectively secure the upper and lower fitment members together.

The modified Henfrey discloses the claimed invention except for the posts being on the lower fitment as claimed. It would have been obvious to one having ordinary skill in the art at the time the invention was made to arrange the posts on the bottom fitment instead of the top fitment, since it has been held that rearranging parts of an invention involves only routine skill in the art. *In re Japikse*, 86 USPQ 70.



Claims 28-33 are rejected as an obvious use of Henfrey as modified by Sparacio and Gross. The method of increasing the shelf-life of a package as claimed is considered a natural use of the Henfrey apparatus as modified by Sparacio and Gross, since the modified Henfrey contains all structural limitations as discussed above.

Regarding claim 41, the fitment is made of a first convenient material (page 2, lines 69 and 70) and the flexible container is made of a second thermoplastic resinous material (page 2, lines 20 and 21).

### ***Response to Arguments***

11. Applicant's arguments filed June 30, 2011 have been fully considered but they are not persuasive. In response to applicant's argument that Henfrey does not teach mechanical compression of the fitment, see page 1, lines 81-84 and page 2, lines 45-50 and lines 64-68.

### ***Conclusion***

12. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to DONNELL LONG whose telephone number is (571)270-5610. The examiner can normally be reached on M-F 8AM-5PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, KEVIN SHAVER can be reached on (571) 272-4720. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/D. L./  
Examiner, Art Unit 3754

/KEVIN P. SHAVER/  
Supervisory Patent Examiner, Art Unit 3754